

INFORMATION

FOR

Mr Ronald Campbell of Ballerno, Mr John Macleod of Muiravenside, and Mr Archibald Campbell of Stonefield, Advocates, Archibald Campbell of Knockbuie, and Col Lamont of Monydrian, real and preferable creditors on the estate of Auchinbreck;

AGAINST

The trustees of Sir James Carnegie, and Richard Lochwood, Esq; creditors and judgers of the said estate.

THE late Sir James Campbell of Auchinbreck contracted many debts, far exceeding the value of his estate. Among others he became debtor to the memorialists or their cedents in the following principal sums, bearing interest; and for which he granted them heritable securities upon his estate, whereby they are preferable to the other creditors.

1^{mo}, Mr Campbell of Ballerno is creditor, by heritable bond, of this date, for L. 7000 Scots of principal, containing a penalty of L. 1200.

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1710.

1732. 2do, Mr Campbell of Stonefield is creditor, by heritable bond, for 18,000 merks, with a penalty of 2000 merks.
- March 1735. 3tio, Mr John Macleod is creditor, by two heritable bonds, for L. 50,000 Scots, containing L. 9000 of penalty. And,
1729. 4to, Knockbuie, as assignee of Col Lamont, is creditor, by two heritable bonds, in 8000 merks, with 1000 merks of liquidate expences.

In the years 1737 to 1741 *inclusive*, a great many of Sir James's personal creditors adjudged his whole estate; which made it also necessary for the memorialists to do the like; and accordingly they led adjudications in common form for payment of the principal sums and penalties contained in their heritable bonds, and annualrents due thereupon.

A ranking of the creditors being raised in the 1739, was kept in dependence to the 1760, though the decret of ranking was pronounced in the 1757. By this decret of ranking, which was extracted in the 1760, the memorialists stand ranked and preferred in virtue of their heritable bonds, according to the dates of their infestments, in preference to all the adjudgers; and they are likewise ranked upon their adjudications for the accumulate sums, and interest thereof, upon an equal footing with the personal creditors who had led adjudications, accumulating in like manner the principal sums, annualrents, and penalties, contained in their moveable bonds.

In the years 1744 and 1745 the memorialists severally applied to the Lords, and obtained warrants upon Dougal Mac-tavish the factor, for certain payments to account of the annualrents then due to them upon their preferable debts. These warrants the factor refused to comply with, on pretence of not having sufficient funds in his hands, which delayed their payment for some years; but at length the memorialists, by degrees, received the contents of their warrants, and thereafter received other sums from the factor, to
account

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account of their annualrents, without any previous warrants to that effect; and these other payments were duly stated in the factor's accounts, annually given in, without any objection being made, either to the factor's having credit for them, or to the memorialists being intitled to draw in conformity to the order of ranking.

The decret of ranking being at length extracted in the 1760, the estate was sold in the 1761, in eight different lots, the total price, deducing expences, amounting to L. 34,000 Sterling.

A remit was afterwards made to Mr Boswell to audite the factor's accounts. The personal creditors adjudgers then insisted, That the payments made to the memorialists by the factors should be considered as loans; and therefore interest should be charged thereon: and, on the other hand, the memorialists insisted, That these payments, though made without warrant, should be allowed in part payment of their annualrents, as well as the former payments made by special warrant. The memorialists having brought this question before the court by petition, your Lordships, on the 24th June 1761, pronounced this interlocutor: " Find, That the payments made to the petitioners severally, to account of the annualrents of their debts, without any express warrant, are to be allowed in part payment of these annualrents, as well as the former payments made by express warrant of court; and sustain the said payments accordingly." And, upon a reclaiming petition for the personal creditors adjudgers, your Lordships " found, That the payments made to July 30. 1761. the respondents to account of the annualrents of their debts, though without any express warrant, are to be allowed in part payment of these annualrents; and therefore sustain these payments; and in so far adhere to their former interlocutor, and refuse the desire of the petition."

Another remit was afterwards made to Mr Boswell, to make out a scheme of division; and at a calling before Lord Nisbet,

Nisbet, in February 1763, in absence of the memorialists; the personal creditors represented, That the memorialists, being likewise adjudgers, were so ranked, as that they were intitled to draw both in right of their infestments, and in consequence of their adjudications, whereby they would draw their penalties, with annualrent since the dates of their adjudications, to the great prejudice of the personal creditors; they therefore craved, that the Lord Ordinary would restrict the preference of the creditors infest, who are also adjudgers, to their principal sums, annualrents, and necessary expences: and no compearance being made on the other side, the

Mar. 1. 1763. Lord Nisbet immediately pronounced an interlocutor to that effect. But upon notice of it, a representation was preferred by one of the real creditors; upon advising which,
Dec. 6. 1763. with answers, his Lordship "altered the interlocutor of
" the 1st March (then) last, and ordained the real creditors to be ranked for their principal sums, annualrents,
" and full penalties, till making out the scheme of division of the price by which the creditors are to draw
" their money."

The personal creditors acquiesced in this interlocutor; and Mr Boswell afterwards reported a very accurate scheme of division, by which, agreeable to the decret of ranking, the real creditors are intended to draw, *first*, In consequence of their infestments; and, *2dly*, In consequence of their adjudications, to the effect that, in virtue of the latter, they draw so much of their accumulate sums and annualrents as remains unpaid of their draught in virtue of their infestments, deducing always from the annualrents the payments already received by them from the factor. Sundry intimations were made to the creditors to see and object to this scheme; and no objections having been given in, the Lord *Gardenston*, to whom the cause was remit in place of Lord *Nisbet*, on the 28th February 1767, "approved of the
" scheme, and found the same to be the rule for the pur-
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“ chafers payment of the price to the creditors, and decerned
“ against them accordingly.”

After all these proceedings, a representation against the last interlocutor was given in, in the name of Lady Carnegie, and other personal or postponed creditors-adjudgers, wherein they insisted, *1mo*, That the real or preferable creditors having received payment of the annualrents due upon their heritable debts, the accumulations of their adjudications, so far as made up of preceding annualrents, fell to be struck off. And, *2do*, That the penalties contained in their bonds, which are accumulated in their adjudications, with the proportional interest thence arising, ought likewise to be disallowed, in so far as it exceeded the creditors real expences, and restricted accordingly.

To that representation answers were given in for the real creditors; upon advising which, the Lord Ordinary was pleased to make *avisandum* to your Lordships with the points in dispute; and in order to a report, this information is humbly offered on the part of the real or preferable creditors.

With regard to the first point, respecting the application of the payments which the real creditors (who are here called the *memorialists*) received from the factor, it will be observed, that at the time of their leading their adjudications, there was a very great arrear of interest due to them upon their heritable debts, particularly no less than L. 700 Sterling of by-gone annualrents was due to Mr John Macleod. For these annualrents, as well as for the principal sums and penalties accumulated together, the memorialists adjudged, which they were undoubtedly intitled to do, and was done in like manner by the personal creditors upon their personal bonds.

Again, the memorialists being clearly preferable upon their infestments, and intitled to the possession of the estate, for payment of their interest, did, as already mentioned, soon after their adjudging, obtain warrants on the factor, for certain payments on account of their annualrents. But

no considerable payments were actually received for several years thereafter; and particularly the factor disputed, in a suspension, the warrant which Mr Campbell of Stonefield had obtained; so that though his adjudication was led as early as the 1738, Mr Campbell did not draw any thing till the 1748. The other memorialists were much in the same situation; and it was only in the year 1760, 1761, and 1762, being about the time of the sale, and twenty years after the sequestration, that the factor, in order to lessen the balance in his hands, did, without special warrants, make more liberal payments to the memorialists, which your Lordships found were to be allowed in part, or to account of their annualrents in general, without specifying, whether, by these annualrents, are intended the interests arising on their original heritable bonds, or the interests on the accumulated sums in their adjudications.

The memorialists however humbly hope, that your Lordships will be now of opinion, that these payments must be first applied to the satisfaction of the annualrents that fell due to them since their adjudications. It would, with submission, be adverse to law and equity, to apply these indefinite payments, as the personal creditors contend, first, to the extinguishing the interest on the heritable bonds preceding the adjudications, and therein accumulated, and next to what fell due thereafter. Had the payments been made at the very date of the adjudications, they possibly might have had that effect; but as they were made progressively, at distant periods, after the adjudications, it is just and reasonable they should be applied, first, for clearing the subsequent annualrents due thereupon, so as not to incroach upon those due preceding the adjudication, till after all these subsequent annualrents are paid.

It is indeed an obvious hardship, to cut down any part of the memorialists accumulate sums bearing interest, by partial and indefinite payments, to account of annualrents, made at
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the distance of ten or twenty years after their adjudications, while in the intervening time a great many years annualrent had fallen due, which lay dead, and bore no interest to them. As they were undoubtedly intitled to accumulate the annualrents due at the date of their adjudications, and thereby make them bear interest; so it seems evidently just and reasonable, rather to extinguish, first, the great sum of posterior annualrents lying dead at the time of the payments, than what was legally and properly secured many years before those payments, as a fund bearing interest to them.

The postponed creditors have been pleased to say, That by the method of imputation contended for by the memorialists, they are getting interest upon interest while the money was in their pockets; and in order to give a colour to their objection, these creditors have argued the case as if the memorialists had actually got the money in their hands arising from those partial payments, as early as the dates of their respective adjudications.

But your Lordships see, that this is plainly an erroneous state of the case, as in fact the payments were many years posterior to the adjudications; and in whatever manner these payments may be applied, whether to the interest of the original debts, or to the accumulate sums, they certainly cannot operate *retro*, or earlier than the periods they were actually made. Even supposing, therefore, they were to be imputed to the interests arising on the original heritable securities alone, yet the memorialists must still be intitled to draw, as adjudgers, the annualrent that had fallen due on so much of these bygone interests as were accumulated in their adjudications, down to the respective periods when the said accumulated interest is found to have been paid off. This is the very reverse of getting interest upon interest while the money was in their pockets; for it is simply getting annualrent in virtue of their adjudications upon the annualrent therein accumulated,

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so long as that money was not in their pockets, or until the same was actually paid up to them.

It has likewise been contended by the personal creditors, That the memorialists did depart from the benefit of the accumulation of interest in their adjudication, by afterwards obtaining warrants of payment of these very annualrents, and which were accordingly paid.

But this is also a mistake: for the memorialists never departed in the least from the benefit of their adjudications, by applying for or obtaining those payments; such a thing was never meant or intended by them. They asked, and at length received, certain payments to account of their annualrents; but whether the annualrents of their accumulate sums, or of their original debt, was to be thereby extinguished, is yet to receive a determination. If what is most beneficial to them, is to be of weight in the question, the application ought plainly to be to the annualrents of the whole accumulate sum; but, at any rate, the payments when received cannot in reason be drawn back to interest, which had been secured as a capital many years ago, while large sums of subsequent interest, even on the original principal sum, was lying dead to the creditors.

Principles of
Equity, book 1.
part 2. § 5.

The rule of the Roman law, respecting indefinite payments, That *electio est debitoris*, has been justly departed from with us in many cases, from equitable considerations; and, particularly, it is one rule even with respect to rents levied indefinitely by a creditor, That sums not bearing interest should be extinguished before sums bearing interest. And hence, in the most unfavourable view of this question for the memorialists, namely, that the payments were to be imputed solely to their debts, so far as preferable to those of the other creditors, and consequently to the interest arising from the principal sums contained in their heritable bonds; yet surely that part of the said interest which had fallen due after their adjudications, and lay dead without bearing annualrent, must be

be first cleared, and the surplus only imputed to the preceding interests that were accumulated; and the memorialists must be still intitled to draw in virtue of their adjudications, and according as the same stand ranked with those of the other creditors, the annualrent which had fallen due upon the said interests accumulated, down to the periods when any part of the accumulated interests are found to have been paid.

Leaving this first point with your Lordships, the memorialists come now to the second, respecting the penalties accumulated in their adjudications, which is of still greater consequence to themselves in particular, as well as to the law, and to all adjudgers of bankrupt-estates in general.

With respect to the memorialists own concern, it will be observed, that their penalties in their heritable bonds, though less than a fifth of the principal, yet are considerable, as their debts are large; and the amount of the subject in dispute is greatly augmented, when to the penalties themselves are added the annualrents that have fallen due thereon since the adjudications. Yet the memorialists apprehend, that they are as justly intitled to draw the whole of these penalties, with interest, as the personal creditors adjudgers are to draw any part of the sums in their adjudications. It is indeed singular, that while the personal creditors now objecting have adjudged for principal, annualrents, and penalties, contained in their personal bonds, as well as the memorialists have done for those contained in their heritable bonds, these creditors should oppose the memorialists drawing their penalties, without renouncing their own right to the like penalties; especially considering, that there are many other adjudgers for debts constituted by bills, &c. not bearing penalties, who have a like title and interest to repeat the objection to their adjudications.

And this leads the memorialists, though no wise diffident of prevailing on the merits of the question, to submit to your

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Lordships, in the entry, the competency of this objection *in hoc statu*; when, by the extracted decret of ranking, the memorialists, as well as the objectors themselves, stand ranked upon the estate for the whole accumulate sums in their adjudications, including their penalties.

The memorialists apprehend, that it is in the process of ranking that such objections should be made, if well founded, as it is the purpose of that process to class the creditors, and to ascertain the extent of their debts, and the proportions by which they are afterwards to draw from the price of the estate when sold. Accordingly it was in the process of ranking, that similar objections were made in the cases referred to by the personal creditors.

It may indeed be true, that upon a matter *noviter veniens ad notitiam*, or where a point has been stated, and specially reserved in the ranking, the court has sometimes given relief in the division of the price. But there is no room for any such distinction at present. This objection neither was stated nor reserved in the course of the ranking; though many other objections were strenuously urged by the personal creditors against the memorialists: and, on the contrary, these objectors, as already noticed, claimed the like benefit to themselves from their penalties; and both parties were ranked accordingly. The legal exceptions, of a *res judicata*, and Competent and omitted, do therefore now stand in the way of the personal creditors; and the setting them aside would tend to throw loose all judicial proceedings in rankings. Upon this ground, a postponed creditor in a ranking having prayed the court, that the principal sum and interest might be allowed to each creditor before any should get their expences, the Lords refused it; "because the decret of ranking was extracted, and it was not craved *debito tempore*;" 24th February 1697, Kincaid *contra* Creditors of Langton.

But supposing the objection to be still competent, the memorialists

memorialists submit to your Lordships, that it is neither founded in equity nor law.

Thus, in the *first* place, were equitable considerations to prevail over the law, and penalties only to be allowed in so far as the creditors could qualify a real loss in the way of damage or expence, the memorialists could show, that their penalties are truly not sufficient to indemnify them of their real loss, through the insolvency of their debtor, and the delay of payment thereby occasioned.

More particularly, as to the memorialist Mr Macleod, there was upwards of L. 700 Sterl. of bygone annualrents due to him on his heritable bonds for L. 50,000 Scots of principal, at the time of his adjudging, in the 1738; and although he did, long after his adjudication, receive certain payments from the factor, as already mentioned, yet after all those payments received by him, at Martinmas 1760, when the estate was sold, a very considerable sum of interest was still due to him. He has given in to process a calculation of the damage, or loss of interest sustained by him through his not receiving payment of the annualrent of his original principal sums at the end of every two years, being the usual period for paying such annualrents; and whereby it appears, that, after allowance of all the payments he ever received, he has been out of pocket, by that delay of receiving his annualrents, no less than L. 1204 : 11 : 10 Sterling, which he would have made had his annualrents been regularly paid him. This sum far exceeds the penalty of L. 9000 Scots, or L. 750 Sterling, adjudged for by him, and would be more than equivalent to all that he can draw in virtue of that penalty, as the accumulations in his adjudication only come in equally with those of the personal creditors.

2do, As to Mr Campbell of Stonefield, his heritable debt is L. 18,000 merks, and the penalty in the bond 2000 merks, being only a ninth part, instead of a fifth, as usual, of the debt. He did not draw any of his annualrents earlier than the

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1748; and from a like calculation, it appears, that his loss or damage, by not getting regular payment of his interest once in two years, amounted to no less than L. 278 Sterling. Besides, Mr Campbell was put to considerable expence in discussing the suspension which the factor raised of the warrant he obtained upon him.

3^{to}, Mr Campbell of Ballerno's debt is L. 583 : 6 : 8 Sterling, secured by infestment in the 1710, and his penalty only L. 100, being less than the fifth. Through the not regular payment of his annualrents at the end of every two years, he had lost at Lammas 1760 L. 95 : 11 : 10, and there was then owing him L. 94 : 18 : 2 of interest lying dead. When the expence of his adjudication, and that incurred in discussing an objection to his debt, which was repelled, and in other questions that have arisen since the commencement of the ranking in the 1739, are also taken *in computo*, the whole in like manner exceeds the amount of his penalty.

And, 4^{to}, As to the case of Col Lamont, and Knockbuie his assignee, it is no better than that of the other memorialists. Their penalty is only 1000 merks, being equivalent to the eighth part of their principal sum of 8000 merks, and they have sustained loss to a considerable amount, by lying out of their annualrents; which, together with the expence of their adjudication, and discussing questions with the personal creditors, must have more than equalled their penalty.

Thus, according to the objectors own principles, the memorialists are even in equity intitled to draw their full accumulations, as they do not thereby make any gain, nor even receive indemnification of the loss they have sustained through the insolvency of their debtor.

But after making the above observations for your Lordships satisfaction, and to justify the memorialists conduct in maintaining this branch of their claim, they must, in the next place, humbly contend, that even supposing they had sustained

sustained no damage, expence, or loss, in any proportion to their penalties, yet they have, by the force and authority of positive and established law, a clear right to draw these penalties, as well as the rest of their debts, in pursuance of the adjudications led by them, and of which they cannot be deprived.

The personal creditors have in substance argued, " That although, in general, penalties contained in bonds are equivalent to a fifth, and in strict law may be due upon the debtor's failing to pay at the term stipulated ; yet in equity the same is restricted to the creditor's real expences : That by the original nature of apprisings, as explained in the statute of Alexander II. the creditor was only to have lands assigned to him to the extent of his principal sum, with damages, expences, and interest : That by the act 37. of James III. the lands were to be apprifed only to the *avail of the debt* ; and that although afterwards, by the covetousness of creditors, and unwillingness of debtors to surrender any part of their lands, it came to be the practice for creditors to apprise great estates for small debts, and to accumulate the conventional penalty in lieu of the real expences, yet this practice was an abuse ; and that therefore the same equity which restricts penalties in personal securities to the real amount of the creditors expences, must be equally effectual to limit the same, when accumulated in an adjudication, especially in questions with competing creditors : And this is said to have been accordingly done in some cases, particularly that of Sir Hugh Hamilton *contra* Lockhart Wiseman."

By this argument, the objectors would not only forfeit the memorialists of their legal right, but overturn and repeal one of the most certain and well known rules of the law of Scotland. The restriction of penalties in personal securities where no adjudication has been led, is altogether foreign to the point in dispute ; because it is the adjudication which e-

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stablishes the creditor's right to draw the full penalty out of the estate, together with the principal and interest, as an indemnification, not only for his expences, but for the inconveniency of lying out of his money, and being obliged to take land, or a security upon it, in lieu of it. If any point in law can be considered as clear, it is surely this, That if a creditor is obliged to adjudge for a bond-debt, and does not obtain a special adjudication, he is intitled to adjudge for the penalty of his bond, as well as the principal and interest, and to accumulate the whole into one sum, bearing interest thereafter ; and that if his adjudication is formal, the lands are not redeemable from him, otherwise than by payment of this accumulate sum, with interest due upon it.

The personal creditors have scarce disputed, that what has been just now said is true, so far as regards the interest of the debtor himself, who has only right during the legal to the reversion of the lands, upon making payment of the sum so accumulated. Now, if an adjudication led in this manner is good against the debtor, the memorialists apprehend that it must be equally so against his other creditors ; since, by likewise adjudging his estate, they only carry the reversion competent to him, if their adjudications are beyond the year, or if within it, come in *pari passu* with the first effectual adjudger, for their accumulate sums, including their penalties, if, as in this case, they have in like manner adjudged for penalties.

The old act of King Alexander II. and other early statutes, which authorise apprisings to be led for the *damage, interest, and expences* of the creditor, justify the modern practice, as conventional penalties are truly certain sums to which the damage and expence of the creditors are liquidate by agreement. And the later act of King James III. appointing lands to be apprifed for *the avail of the debt*, must be understood to import the whole debt, as consisting of damage and expences, or of a liquidate penalty, as well as of principal sum and annualrents.

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Again, whatever might have obtained in very ancient times, the practice of adjudging for penalties, and recovering the same out of the estate, has been well established for above a century past. Thus the acts 6. and 7. 1621, and the act 62. 1661, relative to apprisings, all declare the lands to be redeemable upon payment of "the sums for which the apprisings were led." And as it is certain, that at the time of those acts, the practice was to apprise for penalties, as well as for principal and annualrents, it follows, that the one was to be paid to the creditor as well as the other.

But the act 19. 1672, which in place of apprising, established the diligence of adjudication, has still better explained the principles, as well as justified the practice of adjudging for penalties. That statute first appoints as much of the debtor's lands to be adjudged to the creditor, "as shall be worth the sum, principal, and annualrent, then resting to him, and a fifth part more, in respect the creditor wants the use of his money, and is necessitate to take land for the same, besides and attour the composition to the superior, and expences of infestment." And Lord Stair observes upon this part of the statute, "That though a fifth part be added, it is no more than the ordinary penalty, being L. 100 for 1000 merks, and 50 merks for the sheriff-fee, makes 200 merks, being a fifth part of 1000 merks, and which was sustained in the most favourable cases of apprisings from the beginning, when the reversion was for seven years." Thus the fifth more in special adjudications was allowed, for the good reasons assigned in the act, and as equivalent to the ordinary penalties formerly allowed in apprisings; and accordingly your Lordships have found, that such adjudications were only redeemable upon payment of the fifth part more, as well as for principal and annualrents, 30th June 1737, Baillie *contra* Watson of Saughton. In like manner, since the 1672, the people have, on the authority of the statute, generally made their

their conventional penalties amount to a fifth of the debt, although it has been shown that the memorialists have been much more moderate in that respect.

But, to proceed: As those special adjudications could only be obtained in the case of the debtor's producing a progress, and purging incumbrances, the act 1672 further provides, "That if the debtor fail so to do, it shall be leifome to the creditor to adjudge all or any right belonging to his debtor, in the same manner as he might have apprised the same. Since this act, summonses of adjudication have contained two conclusions adapted to these alternatives; and failing a decret upon the first, the creditors obtain a general adjudication in terms of the last; which was accordingly done by all the parties now in the field. As by the first alternative they are intitled to a fifth more than their principal and annualrents, in respect of their lying out of their money, and being obliged to take land for it; so by the last they for the same reason get the lands adjudged to them for their principal, annualrent, and penalty, to the effect of their recovering that penalty, as well as any other part of their debt.

Indeed, so little doubt was afterwards entertained of the adjudger's right in that case to accumulate the penalty, that the practitioners thought the statute 1672 intitled the creditor, over and above it, to a fifth part more, which properly was only meant to be given in special adjudications in lieu of the penalty. This erroneous practice occasioned the act of federunt of the 26th February 1684, which discharged the same in time coming, but did in the most express terms declare, that in general adjudications, the penalty should be accumulated; and the Lords even sustained those erroneous adjudications already exped, to the extent of the principal, annualrent, and penalties, cutting off only the fifth part more. The words of the act are, "That where the adjudication is general, in absence of the debtor, without probation of the rental, the decret ought to be for the principal sum, annualrent,

" nualrent, and *penalty*, (if any be), contained in the bond, " or other writ, which is the ground of the adjudication."

Thus it is clear, that by law a creditor is intitled to adjudge for and accumulate his penalty. And this is confirmed by universal practice for ages past; and by the same practice the adjudger has been allowed to draw the full penalty, as well as the rest of the accumulate sum, unless where his diligence was liable to some nullity or defect in form. The memorialists cannot discover a single instance where a redemption was executed either by the debtor or co-adjudgers, without payment of the full sums adjudged for, or where a creditor was ranked for his principal sum and interest, and not likewise for his penalty, if his adjudication was formal, as the memorialists are acknowledged to be.

It is needless to search for more authorities upon a point so clear as scarce to have ever been called in question. It shall only be noticed, that Lord Bankton, after mentioning that conventional penalties are restricted to expences in some cases, ^{Vol. r.p. 473-§ 75.} adds, " Except in the case of adjudications, wherein the law " accumulates the penalty and bygone interest, and makes " the whole a principal sum affecting the lands adjudged."

If then the law and practice of Scotland has clearly established this right in a creditor-adjudger, it must be in vain for the other creditors to set up a plea of equity or favour against it. General rules, in their application to particular cases, will be often attended with inconveniencies; but they cannot therefore be altered, and made to bend to every case according to circumstances; because, without adherence to them, the system of law cannot be preserved. This court has, with great deference, no power to alter or dispense with the law, and can and does only give relief of accumulations from equity, where a creditor has, by some informality, rendered his diligence defective, which makes way for the court's interposition, either for cutting it down entirely, or sustaining it only so far as the judges think equitable and

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just. But as no informality here occurs, this court cannot deprive the memorialists of any part of that right with which the law has fully invested them.

Neither do the decisions cited by the postponed creditors tend in the least to support their plea, or impugn the doctrine maintained by the memorialists.

In the case of Sir Hugh Hamilton *contra* Lockhart Wifeman, which occurred in the 1753, the adjudication was restricted to the principal sum and annualrents accumulated at the date of the decret, together with the necessary expences, on account of nullities or certain defects which deprived it of its full legal force, and left the court at freedom to restrict it, or annul it, at pleasure.

And in the still later case of the creditors of Kinminity *contra* Gordon of Cluny, the adjudication at Cluny's instance was objected to in the ranking *quoad* the penalties, as having been an emulous and oppressive diligence, seeing little or no annualrent was due at the date of it, and the sequestration of the estate had been expressly burdened with the payment of Cluny's interest as a preferable debt: Yet your Lordships found, "That the said John Gordon, and other creditors—
"adjudgers, must be ranked for their whole accumulate
"sums, including the penalties, reserving the restriction of
"the penalties till making out the scheme of division." The matter was no further pushed before your Lordships, and terminated thus: That Cluny, in lieu of his penalty of L. 600 Sterling, accepted of L. 500 instantly paid, rather than lie out of the whole of his large debt till the issue of a litigation in the division.

In short, nothing can be inferred from these cases contrary to the established law and practice contended for by the memorialists, and supported by as many decisions as there have been redemptions of adjudications and rankings upon bankrupt estates.

And, to conclude, were it competent for your Lordships to
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alter or dispense with the law or practice, the memorialists humbly deny that it would be expedient to do so. By the Common or Civil law, there was no modification of conventional penalties, because these were adjoined to contracts, in order to liquidate the *interesse* of the party; a thing extremely uncertain in itself, and in its probation. From this uncertainty, the parties were relieved, by stipulating a penalty, which was therefore exacted to the full, § 18. *Inst. De inutil. stipul.* The same reason occasioned the introduction with us of penalties in bonds: and although these are not commonly exacted beyond the real expences, where nothing further occurs than a failure in the debtor to pay *ad diem*; yet if he delays the payment so long, that the creditor is obliged to adjudge his lands, to lie out of his money for many years, to have a great arrear of interest dead, and at length either to take land for his money, or to draw a dividend from the sale of his estate, which often is inferior to the amount of the neat debt, even exclusive of penalties or real expences, it is highly reasonable and just, that such creditor should be secured of some reparation, by being intitled to include the penalty stipulated by the debtor himself in his accumulation. And the only restriction which it has been thought necessary to impose as to formal adjudications, whether special or general, is, that the consideration allowed shall not exceed a fifth of the principal sum, which is allowed to the creditor, in regard of his being obliged to submit to a dispensation from the common rule, That *aliud pro alio invito creditore solvi nequit*.

In respect whereof, &c.

D A V. R A E.

Ex. G. M. B.

3/17/02.

Feb. 2 1769 - Heard as to the Imputation of the Payments, that they
are to be applied ^{at their respective dates} first to the Annually due before
~~the Annually due before~~ ^{on the Annually bonds} ~~the Annually due before~~ ^{on the Annually bonds} - and next to the a
nnually due ^{on the Annually bonds} after the Annually due. - And as the
the Annually due sustained them to the full extent carry
ent from the date of the Adjourn

Lord Brough was of opinion that a proportion of the Annually
due should only be allowed corresponding to the sum de
manded with what was paid - but few or none
were in that opinion.

The President said he would not during the equitable powers
of the court to interfere in restricting an Annually
due, but that the case where they did restrict
such ought to be attended with strong and clear equi
table considerations, stronger than in this case, such
as when the fees would not possibly have sustained the
lease damage, or no damage equal any way to the
Annually, and the Annually, a very large sum.